

ORIGINAL

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554**

JUL 31 1995

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of)
)
Amendment of Parts 21 and 74)
of the Commission's Rules)
With Regard to Filing Procedures)
in the Multipoint Distribution)
Service and in the Instructional)
Television Fixed Service, and)
)
Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)

MM Docket No. 94-131

DOCKET FILE COPY ORIGINAL

To: The Commission

PETITION FOR RECONSIDERATION

Hispanic Information and Telecommunications Network, Inc., ("HITN"), by its counsel and pursuant to 47 C.F.R. Section 1.106, hereby submits its Petition for Reconsideration of the Commission's decision with respect to the above-referenced proceeding.¹ HITN specifically seeks reconsideration of that part of the Report and Order which establishes the rights and responsibilities of the BTA Authorization holder vis a vis ITFS licensees. See Report and Order, FCC 95-230, *Supra* at para. 41 The Commission's proposal to award the Basic Trading Area ("BTA") Authorization

¹ Petitions For Reconsideration were required to be filed by July 30, 1995. See Report and Order, Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, FCC 95-230, released June 30, 1995. Consequently, the HITN Petition For Reconsideration is timely filed.

24

holder the right of first refusal for each future ITFS airtime lease agreement is a legally impermissible extension of a Commission licensees authority. It is also an illegal restraint of trade. Consequently, the FCC's action in this regard must be reversed. In support whereof, the following is submitted.

I. The Commission's Action is Improper

The Commission has no authority to extend the right of first refusal to the BTA Authorization holder *vis a vis* ITFS licensees. The Communications Act of 1934, as amended, empowers the FCC to license the spectrum. However, the Commission has no authority over third parties where there is no nexus to the FCC's regulatory authority. In this case, there is none.

While the Commission has the authority to regulate the contents of an airtime lease agreement, the Commission has gone beyond that limit to mandate the parties with which an ITFS licensee can enter an airtime lease agreement. It is one thing for the Commission to award licenses; it is quite another to hand out airtime lease agreements.

In effect, the Commission is interfering in the ITFS licensee's right to contract with a third party. The Commission has steadfastly taken the position in the past that, when called upon to settle a dispute between a lessor and lessee, or any other licensee, it would not and will not intervene with respect to the contractual arrangements between parties. In this case, the Commission is making the ultimate intervention, by allowing a BTA authorization holder to eviscerate the contractual agreement

entered into between an ITFS licensee and a unrelated third party. This action is unprecedented.

This action by the Commission is also an illegal restraint of trade. As the Commission is well aware, the wireless cable industry stands poised on the brink of the era of digital compression. This will allow an ITFS licensee, with its four channel group, to offer a lessee the capability of offering a 30 to 40 channel system to the public.² Offering a virtual monopoly for the entire BTA to the highest bidder, for all available MDS and ITFS channels, will stifle any competition in that market. The competition to the wired cable industry offered by the wireless cable industry is the oft-repeated mantra of the Commission, in its efforts to further the development of the wireless cable industry.³ These new measures will virtually eliminate competition within the wireless cable industry itself, preventing new companies from offering new systems in any given market once the BTA authorization is issued. This backward step, after years of

² This capability is embodied in the Commission's new rules for partitioning BTAs. See Report and Order, FCC 95-230, *supra*, at ¶¶ 46-47.

³ See, e.g., Notice of Proposed Rulemaking and Notice of Inquiry in Gen. Docket Nos. 90-54, 80-113, 5 FCC Rcd 971 (1990); Report and Order, Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing the Use of Frequencies in the 2.1 And 2.5 GHz Bands Affecting: Private Operational Fixed Microwave Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and the Cable Television Relay Service, 5 FCC Rcd 6410 (1992) (prospect of credible competition to cable benefits public); Order on Reconsideration, *Id.*, 6 FCC Rcd 6764 (1991) (purpose of proceeding is to facilitate "wireless cable" service to public); Notice of Proposed Rulemaking (Amendment of Parts 21 and 74 of the Commission's Rules), 9 FCC Rcd 7665, 7666 (1994).

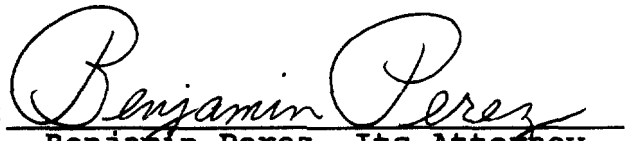
advancing competition in the wireless cable marketplace, cannot be condoned.

WHEREFORE, the foregoing premises considered, HITN respectfully requests that the Commission reconsider its action in *Report and Order*, FCC 95-230, supra, with respect to the issue of awarding the BTA Authorization Holder the right of first refusal for each future ITFS airtime lease agreement, and remove this provision from the Commission's rules.

Respectfully submitted,

**HISPANIC INFORMATION AND TELE-
COMMUNICATIONS NETWORK, INC.**

By:


Benjamin Perez, Its Attorney
1801 Columbia Rd. NW, Suite 101
Washington DC 20009
(202) 462-3680

Dated: July 31, 1995